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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

COMMONWEALTH OF PENNSYLVANIA *et al.*,
*Petitioners*

v.

DELAWARE VALLEY CITIZENS' COUNCIL
FOR CLEAN AIR *et al.*,
*Respondents*

and

UNITED STATES OF AMERICA,
*Respondent*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI

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## REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI

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### INTRODUCTION

This reply brief is respectfully submitted by Petitioners, the Commonwealth of Pennsylvania, Thomas D. Larson, the Secretary of the Pennsylvania Department of Transportation, and Peter S. Duncan, the Secretary of the Pennsylvania Department of Environmental Resources, in support of their Petition for Certiorari, which is presently pending before this Court.

## ARGUMENT

The opposing briefs of Delaware Valley Citizens' Council for Clean Air ("Delaware Valley") and the United States have not shown that the Second Circuit's decision in *New York State Association for Retarded Children, Inc. v. Carey*, 631 F.2d 162 (2d Cir. 1980), which conflicts with the Third Circuit's decision in this case (*Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 678 F.2d 470 (3d Cir. 1982), is distinguishable from this case. The opposing parties have chosen to ignore Petitioners' legal argument that, even with the "Commonwealth" as a party to the 1978 Consent Decree, the Consent Decree could not possibly have provided for an infinite funding stream by the 1978 General Assembly and all future General Assemblies for the emission control inspection and maintenance ("I/M") program. See *Commonwealth ex rel. Fortney v. Bartol*, 342 Pa. 172, 174-75, 20 A.2d 313 (1941), and cases cited therein. The opposing parties also overlook the provisions of the Pennsylvania Constitution and established caselaw that implicitly incorporate into the Consent Decree the "practical and political difficulties" that happened to be explicitly recognized in the consent decree in *Carey*. See Pennsylvania Constitution, Article III, Section 24; *Shapp v. Sloan*, 480 Pa. 449, 473, 391 A.2d 595, 606 (1978), appeal dismissed *sub nom., Thornburgh v. Casey*, 440 U.S. 942 (1979). Finally, Delaware Valley and the United States have totally ignored their prior admissions that the Consent Decree did not require the Pennsylvania Legislature to appropriate funds for I/M. *See* Petition for Certiorari, p. 13, n.9.

The constitutional and political ramifications of the Respondents' arguments as adopted by the Third Circuit are frightening and strike at the heart of the constitutional right of a state legislature (and the U.S. Congress)

to control its own financial affairs. To hold that an executive branch lawyer can bind both presently-sitting and future legislatures to fund a consent decree destroys the delicate balance between the executive, judicial and legislative branches of government. The appropriations power is constitutionally reserved to the legislature and cannot be usurped by an assistant attorney general who never represented the legislature in this action. Moreover, even if the legislature sitting in 1978 were a party, it could not legally bind subsequent legislatures to continue to fund such a decree. *Stone v. Mississippi*, 101 U.S. 814 (1880). Therefore, no federal district court should be permitted to hold a state in contempt for the legislature's exercise of its constitutional right to reject proposed appropriations for the I/M program.

The United States makes an imperfect analogy to decisions in which a "state law prohibition against compliance with a district court's decree cannot survive the supremacy clause of the United States Constitution." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979). The United States neglects to mention, however, that this rule was distinguished in *New York State Association for Retarded Children v. Carey*, *supra*, where the Second Circuit correctly declined to require a state official to "expend state funds for a purpose expressly disallowed by the state legislature." 631 F.2d at 165.

The United States' suggestion that *Carey* would allow a sanction of an alternative between appropriating the necessary funds and facing some undesirable consequence (Brief in Opposition, p. 7, n.3) is misleading. This suggestion is drawn from dictum in the *Carey* opinion in which the Second Circuit discussed the alternatives in correcting constitutional violations at state institutions for the retarded. This remedy is not applicable here be-

cause this case, unlike *Carey*, involves police power issues rather than allegations of state deprivation of federal constitutional rights.

The United States further suggests an analogy to a state legislature's cutoff of appropriations for releasing an incarcerated individual in the face of a federal court's writ of habeas corpus. This is an irrelevant and imperfect analogy. Habeas corpus has no application to this case. There has never been any suggestion that the legislature's cutoff of I/M appropriations violated fundamental constitutional rights. Therefore, lower courts in this case were not intervening to restrain a state from violating fundamental constitutional rights. Instead, the lower courts here are trying to coerce the state itself to perpetually fund the exercise of a discretionary police power function. The existence of a consent decree is not material because no official or branch of the state government has the power to bind its successors to a perpetual funding stream. *Commonwealth ex rel. Fortney v. Bartol, supra.*

Delaware Valley attempts to argue that the Petitioners entered into the Consent Decree and used the Consent Decree to qualify for conditioned federal highway aid funds under Section 176(a) of the Clean Air Act, 42 U.S.C. § 7506(a). Section 176(a) does not pre-condition the receipt of federal aid highway funds on having an I/M program or entering into a consent decree, as Delaware Valley would have this Court believe; rather, Section 176(a) authorizes the Executive Branch to refuse to approve highway projects or highway funds after making a finding that a state has not *submitted* a state implementation plan under the Clean Air Act—which Pennsylvania has submitted in this case. The I/M program is but one part of the multi-faceted state implementation plan. At no time did the Petitioners "use" the consent

decree to qualify for conditional federal and highway funding. It is astounding that the Respondents would distort the facts and law of this case to suggest that the Petitioners used the Consent Decree to meet advance conditions for receiving highway funds when neither the Consent Decree nor Section 176(a) imposes such conditions and Section 176(a) is not even applicable to this case.

Nor do Delaware Valley or the United States disprove the conflict between the Third Circuit's decision and the decision of the Eighth Circuit in *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099 (8th Cir. 1973). Delaware Valley's argument against the relevance of *State Highway Commission of Missouri v. Volpe* centers upon the existence of an Executive Branch sanction for highway funds under Section 176(a) of the Clean Air Act, and again argues that Section 176(a) imposes an express condition of state implementation of an I/M program on federal aid highway grant approvals. This argument is simplistic and inaccurate and mistakenly characterizes the Petitioners' position. Petitioners do not dispute that Section 176(a) provides for Executive Branch sanctions. Rather, Petitioners argue that, under the *Volpe* doctrine, (1) only Congress can set forth the terms upon which highway funds can be spent, and (2) in Section 176(a), Congress has established sanctions to be imposed only by the Executive Branch, and which in any event cannot be imposed in this case. The opposing parties neglect the fundamental distinction between the situation covered by Section 176(a)—the failure to even submit a state implementation plan—and this case, in which Pennsylvania has been disabled from carrying out a portion of the state implementation plan which it has submitted because of a legislative cutoff of funds. At most, Section 176(b) sanctions might apply in this case.

In attempting to defend the Court's mistaken imposition of the Section 176(a) sanction, Delaware Valley points out that the District Court said that it was not imposing Section 176(a) and the contempt sanction, but only that the contempt sanction was "suggested" by Section 176(a). This suggestion and the lower courts' actions were disingenuous. There is no basis for distinguishing between imposing a statutory sanction and imposing the identical sanction because it was "suggested" by a statute, especially where Congress clearly provided that the EPA Administrator was to impose Section 176(b) —and not 176(a)—sanctions in cases where states are not implementing a portion of a previously submitted state implementation plan. The United States' brief says that Petitioners' argument suggests that Congress intended district courts to be "powerless" to impose sanctions to enforce the decree. The United States overlooks the Petitioners' statement that a court could have referred this case to the responsible agency for imposition of sanctions. Further, by making this argument, the United States implies that Congress itself intended that one of its remedies, the Section 176(b) cutoff of program grant funds for failure to implement portion of a SIP, be ignored by the courts.

Finally, both parties mistakenly distinguished *Gautreaux v. Romney*, 457 F.2d 124 (7th Cir. 1972), in an attempt to show that there is no conflict between the Third Circuit and the Seventh Circuit on the scope of the contempt sanction in this case. Delaware Valley suggests that the "inconvenience" to the public and loss of employment must defer to a congressional policy which recognized that the I/M program could compensate for added pollution that accompanied the extension of the interstate highway system, quoting 123 Cong. Rec. 9168 (1977). What Delaware Valley neglects, however, is that this citation to

"congressional policy" refers to a Senate debate *before* Congress rejected that "policy" and instead adopted a two-track system of sanctions in the final version of the Clean Air Act, which had a lesser sanction under Section 176(b) for failure to implement a state implementation plan. The *Gautreaux* decision is in conflict with the Third Circuit's decision, because neither in *Gautreaux* nor in this case were the federal grants withheld by the lower courts explicitly conditioned upon state implementation of a federal program. The distinction alleged by the United States, that the sanctions imposed in *Gautreaux* did not closely correspond with the scheme of sanctions chosen by Congress, depends on the inaccurate conclusion that Section 176(a) of the Clean Air Act applies in this case. In fact, in Pennsylvania the United States is proceeding to impose Section 176(b) sanctions but has notably refrained to act under Section 176(a). Moreover, the Third Circuit Opinion conflicts with the decision of this Court in *City of Newport v. Facts Concerts, Inc.*, 453 U.S. 247 (1981) which held that punitive sanctions "should [not] be visited upon the shoulders of blameless or unknowing taxpayers." 453 U.S. at 267.

In summary, the lower courts have imposed the drastic sanction of cutting off federal highway funds for Pennsylvania Legislature's decision not to perpetually fund the I/M program, even though Pennsylvania could not legally or practically have bound itself to such funding. The decisions reached and remedies imposed by the lower courts in this non-constitutional case are inconsistent and excessive when compared with the judicial caution exercised by other courts even in constitutional cases. *Compare Delaware Valley Citizens' Council for Clean Air*, *supra*, with *Carey*, *supra*, and *Gautreaux*, *supra*. This Court should exercise its powers to review and reverse these excesses of the lower courts.

## CONCLUSION

For the reasons stated herein, and the reasons stated in the Petition for Certiorari filed by the Commonwealth of Pennsylvania, the Secretary of the Pennsylvania Department of Transportation and the Secretary of the Pennsylvania Department of Environmental Resources on August 18, 1982, the instant Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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